

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE No. 527 202
Issued to: Dale W. Waine

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2359

Dale W. Waine

This appeal has been taken in accordance with Title 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order date 15 December 1981, an Administrative Law Judge of the United States Coast Guard at Boston, Massachusetts, suspended Appellant's license for four months, plus four months on twelve months' probation, upon finding him guilty of negligence and misconduct. The specifications found proved under the charge of negligence allege that while serving as Master on board the United States M/V AURIGA, Appellant on or about 10 August 1981, while navigating in conditions of fog and restricted visibility:

(1) failed to obtain, or properly use, information available to him from radar observations to determine the course and speed of another vessel in his vicinity, thereby contributing to a collision with the SS NAUSHON;

(2) failed to use the bridge-to-bridge radiotelephone to determine the course and speed of another vessel in his vicinity, thereby contributing to a collision;

(3) failed to navigate with caution during fog, notwithstanding the fact that information of the proximity and approach of another vessel was available to him from radar observations.

The specifications found proved under the charge of misconduct allege that while serving as Master on board the United States M/V AURIGA under authority of the license above captioned, on or about 10 August 1981, Appellant:

(1) made alterations of course in a series of small increments in violation of Rule 8(b), International Regulations for Preventing Collisions at Sea, 1972, thereby contributing to a collision;

(2) failed to exclude from the pilothouse all persons not connected with the navigation of the vessel, in violation of

46 CFR 97.10-5(a);

(3) failed to proceed at a safe speed, in violation of Rule 19(b), International Regulations for Preventing Collisions at Sea, 1972, thereby contributing a collision;

(4) failed to take way off the vessel, in violation of Rule 19(c), International Regulations for Preventing Collisions at Sea, 1972;

(5) failed to use radar plotting, in violation of Rule 7(b), International Regulations for Preventing Collisions at Sea, 1972, to obtain early warning of a risk of a collision.

The hearing was held at Boston, Massachusetts, on 14, 23, 24 and 25 September, 7 and 16 October 1981.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to each charge and each specification.

The Investigating Officer introduced in evidence nineteen exhibits and the testimony of five witnesses.

In defense, Appellant offered in evidence twenty four exhibits, the testimony of two witnesses and testified in his own behalf.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charges and specifications had been proved. He then served a written order on Appellant, suspending all licenses issued to Appellant for a period of four months plus four months on twelve months' probation.

The entire decision was served on 15 December 1981. Appeal was timely filed on 11 January 1982 and perfected on 30 March 1983.

FINDINGS OF FACT

On 10 August 1981, Appellant was serving as Master on board the United States M/V AURIGA and acting under authority of his license while the vessel was enroute between Woods Hole, MA and Vineyard Haven, MA. The International Regulations for Prevention of Collisions at Sea applied in this area.

The M/V AURIGA is a steel hull freight vessel of 286 gross tons, 139 feet in length with a beam of 34 feet and a draft of approximately 8 feet. The vessel is propelled by four diesel

engines, two serve the port propeller shaft and two serve the starboard propeller shaft. The vessel is required by its Certificate of Inspection to carry a crew of eight, one Master with a First Class Pilot endorsement, one First Class Pilot, three Able Seamen, one Ordinary Seaman and two Oilers. The bridge is equipped with a magnetic and gyro compass, one 3-CM Raytheon radar, one 10-CM Decca radar and two VHF radios as well as a radiotelephone capable of bridge-to-bridge communications. All of this equipment was functioning properly. On 10 August 1981 the clutch of one starboard engine was not operating in the ahead position thereby reducing the maximum speed of the vessel from 9 knots to approximately 7.5 knots.

The vessel was engaged in ferrying vehicles between Woods Hole and Vineyard Haven. The M/V AURIGA departed Woods Hole, MA enroute to Vineyard Haven, MA at about 0835 on 10 August 1981 carrying several motor vehicles, including a tractor-trailor truck, and their drivers. The tractor-trailor truck driver was permitted by Appellant to remain in the pilothouse from the time of departure until the collision.

When the M/V AURIGA departed Woods Hole, the sun was bright and hazy with visibility between three-quarters of a mile and a mile. There was a light southwesterly wind and calm seas.

The vessel departed Woods Hole on a course of 155°T and proceeded at full speed to Buoy No. 5 in Woods Hole Harbor. This took approximately 1-1/2 minutes. At that point, Appellant testified that he observed a fog bank ahead and sounded the fog signal. This brought the lookout to the pilothouse. When the vessel was abeam of Buoy No. 5, Appellant changed course to 115°T. This put the vessel on a direct course to Buoy No. 2 at Martha's Vineyard, about four miles away. When the vessel entered the fog bank between Buoys 5 and 26, Appellant posted a lookout in the pilothouse and instructed him to listen for Buoy No. 26 (a bell buoy). The starboard pilothouse window and starboard door were open. Appellant observed that a southwest current was forcing the vessel in the direction of Buoy 26. At the same time he observed a radar target heading westerly about 200 yards south of the buoy. Appellant changed course from 115°T to 110°T. As the M/V AURIGA passed Buoy 26, Appellant switched the 3-CM radar from 6 mile to 3 mile range. He made the switch when he observed Buoy 2 and a small target on a bearing of 015°T at 1/2-3/4 miles away. Appellant also observed three radar targets on the port side of his vessel about 2-1/2 miles away, headed in a northerly direction.

After passing Buoy 26, Appellant observed target on his starboard side less than 1/2 mile away and three radar targets on his port side heading in a westerly direction and changed course

back to 115°T. Appellant determined that the relative speed between the M/V AURIGA and the largest of the targets, SS NAUSHON, was over 20 knots and the range was only about two miles.

Appellant maintained the same speed while he attempted to determine whether the two vessels were on a collision course. After about a minute, Appellant determined that the relative bearing displayed on the radar did not change. He then changed course from 115°T to 125°T. This produced no apparent effect on the relative bearing between the target and M/V AURIGA. Therefore, Appellant again changed course to 135°T for approximately two minutes. Since the vessels still remained on a collision course while closing rapidly, Appellant slowed, then stopped the engines. About 30 seconds later he put the engines full astern. Within the 30 seconds before the engines were put full astern, Appellant heard a fog signal. Approximately 5 seconds after M/V AURIGA's engines were full astern, the SS NAUSHON came into view out of the fog. The M/V AURIGA collided with the starboard bow of the SS NAUSHON at approximately 0855. Appellant never attempted to establish bridge-to-bridge radiotelephone communication with the SS NAUSHON.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant's contentions are as follows:

1. The facts as found by the Administrative Law Judge do not constitute negligence or misconduct because Appellant's actions were reasonable and prudent under the circumstances.
2. The Coast Guard failed to submit expert testimony on the issue of proximate cause and is therefore precluded from establishing by substantial evidence that Appellant failed to navigate the M/V AURIGA with caution.
3. The Administrative Law Judge erred when he found that the individual who was permitted in the pilothouse was there in violation of 46 CFR 97.10-5(a).
4. The Administrative Law Judge erred when he did not determine that the negligence of the SS NAUSHON was the proximate cause of the casualty.

APPEARANCE: Glynn and Dempsey by Thomas J. Muzyka

OPINION

I

Appellant contends that his actions prior to the collision were reasonable and prudent under the circumstances. I do not agree. His specific contentions are discussed below.

Appellant first contends that his failure to use the bridge-to-bridge radiotelephone was not negligent.

Title 33 U.S.C. Section 1204, however, requires that a radiotelephone be available for the exclusive use of the master or person in charge of the vessel. Section 1201 states that the purpose for the requirement is to provide a positive means whereby approaching vessels can communicate their intentions to one another.

Appellant had an operational radiotelephone but did not use it. He defends this decision by stating that positive radar information concerning the SS NAUSHON was available. Further, he asserts that it was unsafe to divert his attention from the coming of the vessel to attempt radio contact with an unknown vessel. This argument is not persuasive since Appellant testified that this contact would have taken 45-60 seconds. Appellant took little evasive action until approximately one minute before the collision which suggests he could have afforded the time to make radio contact with the other vessel. Appellant further argues that his judgment to rely on radar alone was within the province of a master "in extremis". However, the extremis doctrine applies to a vessel which, through no fault of her own is placed in a position where collision is imminent. Appeal Decision No. 2101 (KELLOGG). If the vessel were in extremis, it resulted from Appellant's action. A radiotelephone call may have provided Appellant with the precise status and intentions of the SS NAUSHON which would have given him adequate information to take the necessary action to avoid the collision. It was not unreasonable for the Administrative Law Judge to conclude that the failure to use the available radiotelephone was negligent.

Appellant next contends that the Administrative Law Judge erred when he found that the course alterations made by Appellant were in violation of Rule 8(b) of the International Regulations for Preventing Collisions at Sea, 1972.

Rule 8(b) of the International Regulations for Preventing Collisions at Sea, 1972 provides that:

Any alterations of course or speed to avoid collision shall, if the circumstances of the case admit, be large enough to be readily apparent to another vessel observing visually or by radar; a succession of small alterations of course or speed should be avoided.

Appellant argues that the amount of course change was limited by the location of targets and by the shoreline. The chart of the area introduced in evidence by the Investigating Officer indicates sufficient water was available to permit more than the two 10° course changes that Appellant made. Assuming, as Appellant argues, there were radar targets that posed a danger to Appellant's port, there was no reasonable explanation for not making a more substantial course change to starboard. However, if the circumstances did not permit an adequate course change in accordance with Rules 8(b) and (c), Appellant should have reduced speed or stopped in order to allow more time to assess the situation. See Rule 8(e). The evidence supports the Administrative Law Judge's conclusion that Appellant violated Rule 8(b).

Appellant also contends that the finding of the Administrative Law Judge that he failed to proceed at a safe speed in violation of Rule 19(b) is not supported by substantial evidence.

Rule 19(b) of the International Regulations for Preventing Collisions at Sea, 1972, provides that:

Every vessel shall proceed at a safe, adapted to the prevailing circumstances and conditions of restricted visibility. A power-driven vessel shall have her engines ready for immediate maneuver.

As indicated by the Rule 19(b), safe speed is not an absolute that can be predetermined, but is based on all prevailing circumstances. Rule 6 of the International Regulations for Preventing Collisions at Sea, 1972, sets forth the factors to be considered in determining a vessel's safe speed as follows:

In determining a safe speed the following factors shall be among those taken into account:

- (a) By all vessels:
 - (i) the state of visibility;
 - (ii) the traffic density including concentrations of fishing vessels or any other vessels;
 - (iii) the maneuverability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions;
 - (iv) at night the presence of background light such as from shore lights or from back scatter of her own lights;
 - (v) the state of the wind, sea and current, and the proximity of navigational hazards;
 - (vi) the draft in relation to the available depth of water.

- (b) Additionally, by vessels with operational radar:
 - (i) the characteristics, efficiency and limitations of the radar equipment;
 - (ii) any constraints imposed by the radar range scale in use;
 - (iii) the effect on radar detection of the sea state, weather and other sources of interference;
 - (iv) the possibility that small vessels, ice and other floating objects may not be detected by radar at an adequate range;
 - (v) the more exact assessment of the visibility that may be possible when radar is used to determine the range of vessels or other objects in the vicinity.

What is a safe speed must be determined on a case by case basis after analyzing the facts based on the factors listed in the rule. There can be no general rule for such a concept because of the many variables in any situation. Decision on Appeal No. 2294 (TITTONIS). In this case, visibility was limited by fog, there were radar targets of unknown identity and intentions, yet, Appellant did not reduce speed until approximately one minute before the collision. This action was in violation of Rule 8(e) International Regulations for Preventing Collisions at Sea, 1972, which provides that:

If necessary to avoid collision or allow more time to assess the situation, a vessel shall slacken her speed or take all way off by stopping or reversing her means of propulsion.

The conclusion that Appellant's speed was excessive is supported by his admission that he did not have time to plot or use the bridge-to-bridge radiotelephone. A reduction in speed would have afforded more time to make a radar plot and use the radiotelephone. If necessary, he should have stopped until the intentions of the other vessels were clear.

Based on the record, the Administrative Law Judge's conclusion that the M/V AURIGA was not proceeding at a safe speed is reasonable. It will not be disturbed.

Appellant further contends that the Administrative Law Judge erred by finding that Appellant failed to use radar plotting or equivalent systematic observation of detected objects in violation of Rule 7(b).

Rule 7(b) of the International Regulations for Preventing Collisions at Sea, 1972, provides that:

Proper use shall be made of radar equipment if fitted and

operational, including long range scanning to obtain early warning of risk of collision and radar plotting or equivalent systematic observation of detected targets.

Appellant did not make a radar plot. He argues that he did not have time to make a radar plot of the oncoming vessel's course and speed, and that other duties took precedence over making a plot. There are no duties of a master more important than those related to avoiding a collision. Rule 8(e) requires that a vessel shall slacken her speed or take all way off by stopping or reversing her means of propulsion, if necessary, to avoid collision or allow more time to assess the situation. As stated above, Appellant's speed contributed to the lack of time to plot. The M/V AURIGA had a properly functioning radar and was approaching an area of known poor visibility. There was, therefore, an affirmative duty to use that radar. Afran Transport Co. v. The Bergechief, 274 F.2d 469, 476 (2nd Cir. 1960). Failure to make a radar plot in restricted visibility is negligence. The Harbor Star, 1977 A.M.C. 1168, 1190, (E.D.Pa. 1977). Decision on Appeal No. 2277 (BANASHAK). Under circumstances such as those encountered in this case, a reasonably prudent master would make a radar plot. See Decisions on Appeal Nos. 2065 (TORRES), 2059 (LESKINEN) and 2027 (WALKER).

II

Appellant contends that the failure of the Coast Guard to submit expert testimony on the issue of proximate cause precludes it from establishing by substantial evidence the standard of care required in navigating the M/V AURIGA. I disagree.

Appellant attempts to buttress his position by citing Appeal Decision No. 2080 (FULTON). In Fulton, however, there was no violation of any statute or regulation. In Appeal Decision No. 2302 (FRAPPIER) I stated:

The holding in Fulton does not require expert testimony to establish a standard of care when, as here, that standard has been announced in earlier decisions and is readily apparent from the customary principles of good seamanship and common sense.

This is also true where the standard of care is established by Navigation Rules. Appeal Decision No. 2116 (BAGGETT) quoting, in part, Appeal Decision No. 417 (ADAMS) stated "... clear violation of the laws intended to promote safety is unquestionably negligence by any standard."

Appellant contends that it was permissible under the

provisions of 46 CFR 97.10-5(a) to allow a truck driver in the pilothouse during the time in question. I disagree.

Appellant argues that the truck driver came within the exception provided by 46 CFR 97.10-5(a) and his presence did not contribute to the collision. The regulation provides that:

(a) Masters and pilots shall exclude from the pilothouse and navigator's bridge while underway, all persons not connected with the navigation of the vessel. However, inspectors of the Coast Guard, licensed officers of vessels, persons regularly engaged in learning the profession of pilot, officers of the Coast Guard, United States Navy, United States Coast and Geodetic Survey, and the Engineer Department of the United States Army, or Maritime Administration personnel, may be allowed in the pilothouse upon the responsibility of the officer in charge.

An unauthorized presence is the necessary element to prove a violation of this regulation. It is not necessary that the unauthorized presence contribute to a collision.

Notwithstanding the fact the truck driver had a mariner's document, he was not connected in any way with the navigation of the vessel and he was not in one of the authorized categories of persons permitted to be in the pilothouse. Specifically, he was not regularly engaged in the learning of piloting. Permitting this individual in the pilothouse of the vessel violated 46 CFR 97.10-5(a).

IV

Appellant argues that the negligence of the SS NAUSHON was the proximate cause of the collision, therefore no responsibility of it should rest with him. I disagree.

In these administrative proceedings the negligence of others, if indeed there were any, does not absolve Appellant so long as his actions are proved negligent. Decision on Appeal No. 2319 (PAVELEC).

CONCLUSION

There is substantial evidence of a reliable and probative character to support the findings of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge dated at Boston, Massachusetts on 15 December 1981, is AFFIRMED.

B. L. STABILE
Vice Admiral, U. S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C. this 12th day of June 1984.